

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:01CR3063
)	
Plaintiff,)	MEMORANDUM
vs.)	AND ORDER
)	
LAMONT O. SMITH,)	
)	
Defendant.)	

This matter is before the court on the defendant's notice of appeal (filing 161) and on the clerk's recent notice (filing 162) regarding such filing. The notice of appeal was filed with reference to the court's memorandum and order and judgment of April 17, 2006 (filings 159 & 160), which denied the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

Before the defendant's appeal can proceed, a certificate of appealability must issue. See Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

For the reasons set forth in the court's previous memorandum and order (filing 159), the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c).

Accordingly,

IT IS ORDERED that:

1. A certificate of appealability shall not issue in this case; and
2. The Clerk of the United States District Court for the District of Nebraska shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

May 2, 2006.

BY THE COURT:
s/ Richard G. Kopf
United States District Judge